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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 130

OLD COLONY TRUST COMPANY ET AL., EXECUTORS

v.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE

This case is here on certificate from the United States Circuit Court of Appeals for the First Circuit. Two cases involving similar questions on the merits were consolidated in one certificate. The certificate shows that in one case the action was brought by the Boston and Maine Railroad in the United States District Court to recover income taxes alleged to have been erroneously collected. The other case (R. 2) reached the Circuit Court of Appeals by a petition to review the decision of the United States Board of Tax Appeals.

During the argument on the merits, this Court raised the question as to its own jurisdiction in that

case which reached the Circuit Court of Appeals by appeal from the United States Board of Tax Appeals, and suggested that briefs be filed on the following

QUESTION

Does an appeal from the Board of Tax Appeals to a United States Circuit Court of Appeals under the Revenue Act of 1926 present in that court a judicial case or controversy within the judicial power of the United States as defined in Section 2 of Article III of the Constitution so as to be within the jurisdiction of a United States Circuit Court of Appeals, and which may be considered by this Court on certificate from the United States Circuit Court of Appeals?

ARGUMENT

THE RECORD IN THIS CASE IS NOT COMPLETE ENOUGH TO JUSTIFY CONSIDERATION OF THE QUESTION AND THE COURT SHOULD DISMISS THE CERTIFICATE IN SO FAR AS IT DEALS WITH THE BOARD OF TAX APPEALS CASE, OR ORDER UP THE ENTIRE RECORD IN THAT CASE

For the purpose of considering the above question, the record is insufficient because it fails to disclose whether the appeal to the Board of Tax Appeals was taken before or after the enactment of the Revenue Act of 1926. It seems probable that there is a substantial difference between cases reaching the Circuit Court of Appeals where the appeal to the Board of Tax Appeals was taken before the passage of the 1926 Act and those cases in

which the appeal to the Board of Tax Appeals was taken after the passage of that Act. The pertinent provisions of the Revenue Acts of 1924 and 1926 are set forth in Appendix A to this brief.

In determining whether these cases as they reach the United States Circuit Court of Appeals are there cases or controversies, an important consideration is whether the judgment of the Circuit Court of Appeals has finality and becomes a final and indisputable basis of further administrative action determining the rights of the parties, or whether its judgment is without finality and the same matter may be afterwards litigated by the taxpayer in a suit against the United States to obtain a refund.

The Board of Tax Appeals was created by the Revenue Act of 1924. It was given jurisdiction to hear appeals by taxpayers from decisions of the Commissioner of Internal Revenue determining that there was a deficiency in the amount of tax which had been paid. There was no provision for any appeal to the United States Circuit Courts of Appeals or to the Court of Appeals of the District of Columbia. Section 274 (b) provided that if the Board determined there was a deficiency the amount so determined should be assessed and paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner, but disallowed as a deficiency by the Board, could be assessed, but the Commissioner was left at liberty, notwithstanding the decision of the

Board against him, to bring a suit in court against the taxpayer to collect the alleged deficiency. On the other hand, by Section 900 (g), it was provided that the taxpayer, after paying the tax determined by the Board to be due, could bring a suit against the United States for its recovery, and in such suit, brought by the Commissioner or by the taxpayer, the findings of the Board were prima facie evidence of the facts.

By the Revenue Act of 1926 this procedure was changed, and a direct appellate review of the Board's decision was substituted.

Section 1001 (a) of the Revenue Act of 1926 provides that any decision of the Board rendered after the enactment of that statute may be reviewed by a Circuit Court of Appeals or the Court of Appeals of the District "if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered."

If the taxpayer is an inhabitant of any Circuit, the case goes to the court of that Circuit, unless by agreement between the Commissioner and the taxpayer it is taken to the Court of Appeals of the District.

Section 1003 (a) of the 1926 Act provides that the judgments of the Circuit Courts of Appeals and the Court of Appeals of the District on appeal from the Board of Tax Appeals shall be final, subject only to review by this Court on certificate or certiorari.

Section 1005 (a) makes it clear that the decisions of the courts on such appeals become a final and indisputable basis for adjusting the taxpayer's liability.

We now come to those provisions which may make a distinction in the matter of finality of the judgments of the courts between cases where the appeal to the Board of Tax Appeals was taken prior to the passage of the 1926 Act and those cases in which the appeal to the Board was taken afterwards.

Section 284(d) of the 1926 Act provides that "if the taxpayer *after the enactment of this Act* files a petition with the Board of Tax Appeals * * * no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court," with certain exceptions not here material. The effect of this is that if an appeal be taken by the taxpayer to the Board after the passage of the 1926 Act the only judicial review permitted is by appeal to the Circuit Court of Appeals or the Court of Appeals of the District from the decision of the Board and the taxpayer is deprived of the right to relitigate the question by suit in the United States District Court or in the Court of Claims to recover the additional tax after he has paid it. This gave finality to the decisions of the courts on appeals from the Board of Tax Appeals with respect to cases where the appeal to the Board had been taken after the passage of the 1926 Act.

Section 283 (b) provides:

> *If before the enactment of this Act* any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and *except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of Section 284.* (Italics ours.)

The provisions of Section 284 (d), referred to, are those which denied to the taxpayer the power to bring any suit against the United States for the recovery of the tax after he had adopted the procedure of appealing to the Board of Tax Appeals and to the Circuit Court of Appeals.

These provisions are open to the construction that, in a case where the appeal to the Board of Tax Appeals has been taken after the passage of the 1926 Act the taxpayer's only right to resort to the courts is by appeal from the Board to the Circuit Court of Appeals or the Court of Appeals of the District, whose decisions have finality and

finally adjudicate his liability for deficiency, whereas if the appeal to the Board of Tax Appeals was taken before the passage of the 1926 Act the taxpayer has a right to appeal to the Circuit Court of Appeals from a decision of the Board rendered after the passage of the 1926 Act, but notwithstanding his appeal to the Circuit Court of Appeals, Section 283 (b) expressly relieves him from the operation of subdivision (d) of Section 284, which is the provision forbidding him to bring a suit against the United States to recover the tax after he has paid it. The effect of these provisions, if so construed, is to allow him to relitigate in the suit instituted in the United States District Court after he has paid the tax the very questions before the United States Circuit Court of Appeals on the appeal from the Board in those cases where the appeal to the Board was taken prior to the passage of the Act of 1926. This construction of subdivisions (b) and (f) of Section 283 finds some support in the following paragraphs appearing on page 32 of the Report of the Senate Committee on Finance on the Revenue Act of 1926 (Report No. 52, 69th Cong., 1st Session):

> Section 283 (b) covers cases pending before the Board of Tax Appeals at the time of the enactment of the bill and gives the board jurisdiction over those cases, together with the new right of appeal to the circuit court of appeals, and prevents the commissioner from taking any steps to assess or

collect the tax until the decision of the board has become final. But it should be noted that the taxpayer, despite his appeal to the board, is not barred from suit for refund. If he takes advantage of the appeal to the court it is not likely that he will bring suit for refund if the Supreme Court has decided against him on his appeal from the board.

* * * * *

Section 283 (f) relates to cases like those described in the preceding paragraph but which are pending before the board at the time of the enactment of this bill. In such cases the jurisdiction of the board is preserved and the case proceeds in exactly the same manner as in the case of an income tax in the new bill, except that the taxpayer is not barred from his right to claim a refund if the decision of the board is against him.

The statute was so construed in *Emery* v. *United States,* 27 F. (2d) 992, and *Old Colony R. Co.* v. *United States,* 27 F. (2d) 994.

We understand that a committee of the American Bar Association collaborated with the Bureau of Internal Revenue in suggesting to Congress the adoption of those parts of the Revenue Act of 1926 providing for appeals from the Board of Tax Appeals to the United States Circuit Courts of Appeal, and that a committee of the Bar Association has been granted leave to file a brief *amicus curiae,* in which it will take the position that in those cases where the appeal to the Board was taken before the 1926 Act was passed and an appeal is taken by

the taxpayer to the United States Circuit Court of Appeals the judgment of the latter court has finality and it is not open to the taxpayer after he pays the tax, in obedience to the judgment, to thereafter bring suit and relitigate the question in an attempt to obtain a refund. We welcome their brief and hope that they are right, and that they will be able to explain away the last clause in Section 283 (b).

In respect of appeals to the Board taken before the 1926 Act was passed, the statute may mean that the Board's decision alone has no finality and does not prevent a suit for refund, but if the taxpayer appeals to the Circuit Court of Appeals, he is concluded by its decisions.

In any event, it seems to us that there is very substantial room for argument as to whether this difference does exist between cases appealed to the Board before and those appealed to the Board after the passage of the 1926 Act, and if this difference does exist, and there is finality to the judgment of the Circuit Court of Appeals in the one case and not in the other, that difference may become an important consideration in determining whether a case or controversy is presented, and it seems desirable for this Court to know, in dealing with this question, whether the case is one appealed to the Board before or is one appealed after the 1926 Act was passed. The Court should not have to decide two questions when, if the case were properly presented by the record, only one may be involved.

The record in the Circuit Court of Appeals shows that in the *Old Colony Trust Company case* the appeal to the Board of Tax Appeals was taken prior to the passage of the 1926 Act.

We are advised that there are now pending in the Circuit Court of Appeals 212 cases like the one at bar, in which the appeal to the Board of Tax Appeals was taken before the 1926 Act was passed, and that there are approximately 1,000 cases now pending before the Board of Tax Appeals and not yet decided by it, in which the appeals were taken to the Board before the 1926 Act was passed.

The question, therefore, as to whether a case or controversy is presented in the Circuit Court of Appeals in a case where the appeal to the Board was taken before the passage of the 1926 Act is an important one, and no doubt would ultimately reach this Court in any event.

We have confidence that in respect of cases where the appeals to the Board were taken after the 1926 Act was passed and where, by the plain provisions of the statute, judgments of the Circuit Courts of Appeals finally determine the rights of the parties and become the final and indisputable basis for satisfaction of the taxpayer's liability, a case or controversy is presented to the Circuit Court of Appeals. The opinion of the Senate Committee on Finance on these points is set forth in Appendix B hereto. If the section dealing with appeals taken to the Board of Tax Appeals before the 1926 Act was passed be construed to deprive the judgments of the

United States Circuit Court of Appeals of finality, a serious question is presented. Both questions are important and difficult, and we feel that an opportunity for oral argument should be given. Because of this, and the state of the record, we respectfully suggest that, pursuant to Section 239 of the Judicial Code, the Court require that the entire record in the *Old Colony Trust Company case* be sent up for its consideration, and that in due course this question be argued orally.

In No. 129, *United States* v. *Boston & Maine Railroad,* the certified question should be answered.

Respectfully submitted.

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JANUARY, 1929.

APPENDIX A

REVENUE ACT OF 1924, ACT OF JUNE 2, 1924, C. 234, 43 STAT. 253

SEC. 274. (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

SEC. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice and

consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

* * * * *

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated.

REVENUE ACT OF 1926, ACT OF FEBRUARY 26, 1926, C. 27, 44 STAT. 9.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed

or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

SEC. 277. (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 279. (a) If the Commissioner believes that the assessment or collection of a deficiency will be jeojardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the Commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

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(c) The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of subdivision (f) of section 274 and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or is subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) If the jeopardy assessment is made after the decision of the Board is rendered such assessment may be made only in respect of the deficiency determined by the Board in its decision.

(e) A jeopardy assessment may not be made after the decision of the Board has become final or after the taxpayer has filed a petition for review of the decision of the Board.

(f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in subdivision (j) of this section.

(g) If the bond is given before the taxpayer has filed his petition with the Board under subdivision (a) of section 274, the bond shall contain a further condition that if a petition is not filed within the period provided in such subdivision, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subdivision.

(h) Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(i) When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount

determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 284. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(j) In the case of the amount collected under subdivision (i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under subdivision (i) of this section, or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in subdivision (j) of section 274. If the amount included in the notice and demand from the collector under subdivision (i) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month (or, for any period the estate of the taxpayer is held by a fiduciary appointed by any court of competent jurisdiction or by will, at the rate of 6 per centum per annum) from the date of such notice and demand until it is paid.

(k) No claim in abatement shall be filed in respect of any assessment made after the enactment of this Act in respect of any income, war-profits, or excess-profits tax.

SEC. 282. (a) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any tax-

payer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the provisions of subdivision (a) of section 274, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claim for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the

Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the

Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

TITLE X.—BOARD OF TAX APPEALS

SEC. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

TITLE IX.—BOARD OF TAX APPEALS

Membership of Board

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; ex-

cept that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his pred-

ecessor was appointed shall be appointed only for the unexpired term of his predecessor.

* * * * *

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

* * * * *

SEC. 906. (f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be prima facie evidence of the facts therein stated.

SEC. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceed-

ings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding upon motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any

division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. * * *

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpoena ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his

direction and shall then be subscribed by the deponent.

SEC. 909. (a). Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax.

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

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(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. If as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is

paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated.

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

APPENDIX B

Senate Report No. 52, and House Report No. 1, 69th Congress, First Session, explain the court review of decisions of the Board of Tax Appeals in practically identical language. The following is taken from the Senate Report (pp. 36–37):

> *Court review — Questions of fact and law.*—The procedure for review of determinations of the board is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the Packers and Stockyards Act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of Section 1003 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper

interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 of the revenue act of 1924 as amended in the pending bill and subdivision (b) of section 1003 of the pending bill). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax

in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.

Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

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